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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 413

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

F. W. WOOLWORTH CO.

BRIEF FOR F. W. WOOLWORTH CO. IN OPPOSITION

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NATIONAL LABOR RELATIONS BOARD,
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v.

F. W. WOOLWORTH CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR F. W. WOOLWORTH CO. IN OPPOSITION

Opinions Below

The opinion of the Court below (B.A. 13-20*) is not yet reported. The findings of fact, conclusion of law and order of the Board (R. 24-48, 57-68**) are reported at 109 NLRB 196.

Jurisdiction

The judgment of the Court below was entered on June 25, 1956 (B.A. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act as amended.

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* "BA" refers to the appendix to the Board's brief.
** References to the portion of the printed record are designated as "R".

Question Presented

Whether the Court below properly found that the employer need not furnish to a union, certified as the bargaining representative in an appropriate unit, information requested by the union as to the individual wage rates and hours worked by the employees in the bargaining unit where the union demonstrated no reasonable need for the information.

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, et seq.) are as follows:

Unfair Labor Practices

"Section 8(a) It shall be an unfair labor practice for an employer—

• • •

(5) To refuse to bargain collectively with the representatives of his employees subject to the provisions of 9(a).

• • •

(d) For the purposes of this section to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment for the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: • • •"

Statement

1. The facts: On March 11, 1952, a collective bargaining agreement was entered into between F. W. Woolworth Co. Store No. 433, herein called the "Respondent," located in San Bernardino, California, and the Retail Clerks Union, Local 1167, A.F. of L., herein called the "Union". The contract was to be in full force from the date of execution until March 5, 1954 (R. 26; 8 to 15, 16).

Section 5 of the contract, as is usual in collective bargaining agreements, established the basic minimum wage rates to be paid to all employees (R. 9). Section 17 of the contract, the Management Prerogative Clause, reserved to the Respondent among its "exclusive responsibilities" the right to adjust the wage rates above the minima set forth in Section 5 or, in effect, to grant merit increases (R. 13). Therefore, the actual wage above the minimum wage was to be solely in the Respondent's discretion.

In Section 21(b) the contract further provided for a wage adjustment during the life of the contract on March 7, 1953. This adjustment was to apply only to the basic minimum wage rates and was to be made in accordance with the change in the cost of living set forth in the National Bureau of Labor Statistics Index. A larger adjustment in these basic hourly minimum wage rates could be made by mutual agreement between the parties (R. 14 to 15; 26 to 27).

Several days after the execution of the agreement, upon the Union's request, the Respondent supplied it with a list of all the employees in the bargaining unit. The Union acknowledged its receipt and further requested hour and actual wage data on each employee for the period prior to

the executed agreement. This information was not furnished (R. 22; 28; 31 to 82).

At the time of the execution of the collective bargaining agreement the Respondent and Union devised a form whereby Respondent would notify the Union of new employees. Such employees were informed about joining the Union within 30 days of their employment. These notifications of new employees were received by the Union from the Respondent but were not kept as records by the Union (R. 31; 88 to 91).

On January 31, 1953 the Union requested a conference concerning the cost-of-living increase provided under Section 21(b) of the contract. The BLS Index at this time showed approximately a 1.42 cents per hour increase would be required, or about 57 cents for a 40 hour week.

During the following meetings to discuss the cost-of-living increase taking place in March, the Union submitted to the Respondent a proposed increase of $2.00 per week, and on March 13th the Respondent offered an increase of $1.00 per week (R. 27; 15 to 19; 82 to 87).

The Union, in the course of the discussions, renewed its request for actual wage, hour and classification data, this time asserting that the information was needed "for the intelligent and equitable administration of the agreement" as well as for wage adjustment. The request was refused along with other similar requests. (R. 20; 22; 28; 58; 82 to 88; 102).

By letter dated May 1, 1953, without having received the requested information, the Union notified the Respondent that it accepted the Respondent's offer to increase the basic minimum wage by $1.00, which was in excess of the actual cost of living increase of 57 cents as indicated above (R. 20; 21; 27; 58; 99). The Respondent acknowledged the acceptance of the increase on May 2, 1953.

Notwithstanding the reaching of the agreement, the Union, on May 5, 1953, again requested the actual wage data and the Respondent did not reply (R. 22; 28; 87; 102). On June 18, 1953 the Union filed a charge with the Board, alleging, among other things, that the Respondent violated Sections 8(a)(5) and (1) of the Act by rejecting the Union's request for this payroll information.

2. The Board's decision: The Board, noting it had held consistently and with uniform Court approval that "an employer is under a duty to accommodate a union's request for relevant wage information", concluded that whether the union's request for payroll information be considered as relating to the pending discussions of a cost-of-living adjustment or as relating to the administration of the parties' collective bargaining agreement, Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to comply with the request (R. 58, 59).

Accordingly, the Board ordered Respondent to cease and desist from the unfair labor practice found, and affirmatively, to furnish the union, upon request, the name, classification, hours worked and wage rate of each employee in the appropriate unit and to post the usual notices (R. 63-64).

3. The decision of the Court of Appeals: The Court below, recognizing this Court's recent holding in *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, that in such cases the union's right to the information is not a universal one but "depends on each case's peculiar circumstances", held that the union was not "entitled to information highly personal to employees" in the absence of "a showing of reasonable need of the information to meet a condition" (B.A. 19). Noting that the contract reserved to management exclusive control over incentive or bonus pay schedules and the amount of overtime work, the Court

stated that "the relevancy of the demand with respect to the wage increase negotiations was at no time demonstrated" (B.A. 17). With respect to the union's contention, sustained by the Board, that the data was needed "for the intelligent and equitable administration of the contract", the Court below held that the union must show specific need for specific data and that "if the reason [for seeking the data] is not obvious then he who asserts the claim should demonstrate to him against whom it is asserted some relevant particularity" (B.A. 19).

Reasons for Denying the Writ

The Board would have it that the decision below conflicts with decisions of the Courts of Appeals for the First, Second, Fourth and Fifth Circuits, respectively, cited as *Boston Herald-Traveler Corp.* v. *National Labor Relations Board,* 223 F. 2d 58 (CA 1); *National Labor Relations Board* v. *Yawman & Erbe Manufacturing Co.,* 187 F. 2d 947 (CA 2); *National Labor Relations Board* v. *Whitin Machine Works,* 217 F. 2d 593 (CA 4), certiorari denied 349 U.S. 905; *National Labor Relations Board* v. *The Item Co.,* 220 F. 2d 956 (CA 5), certiorari denied 350 U.S. 836.

The Court below, using this Court's opinion in *National Labor Relations Board* v. *Truitt Mfg. Co.,* 351 U.S. 149,[1] as its yardstick, found that the union had not presented any particular relevance for the requested information and thus the employer had no duty to furnish it. This Court stated in the *Truitt* case that in refusal to furnish information cases, "* * * Each case must turn upon its particular facts. The inquiry must always be whether or not

1. In the *Truitt* case the facts are somewhat different, but the principles involved are equally applicable to all cases involving an employer's refusal to furnish information and data sought by a union. Involved was a request for information concerning the company's financial position. The company's position was that it could not afford the union's wage demands and the union had asked them to prove it.

under the circumstances of the particular case the statutory obligation to bargain in good faith has been met."

The Board erroneously would have the refusal to furnish information constitute a *per se* refusal to bargain with an utter disregard for the *Truitt* doctrine. It is urged, contrary to the *Truitt* case, which found the requested data "highly relevant" at the bargaining table, that a showing of relevancy no longer has a place in this area in the determination of a refusal to bargain.

The facts in the instant case set it completely apart from the decisions which the Board now asserts are in conflict with the Court's decision. Of particiular note are the pertinent circumstances surrounding the union's request for the data. On March 11, 1952 the union and the company entered into a two-year contract providing for a cost-of-living adjustment on March 7, 1953 of the basic minimum wage rate (see Section 21, B.A. 26). A further adjustment by mutual agreement was also contractually provided for. The first request for individual wage data with which the Board and the Courts are concerned, was made during the limited reopening to discuss the cost-of-living adjustment. It was urged that the information was needed "for the intelligent and equitable administration of the contract." After the cost-of-living adjustment was made the demand was repeated with the same reason given for its necessity.

In the contract in the instant case, Section 17 gave management exclusive and absolute control over incentive or bonus pay schedules and merit increases (B.A. 24-25). This, by agreement of the parties, was to be within Respondent's sole discretion. Despite this, the Union is requesting information relating to this area.

The Board's paraphrase of the contract on page 3 of its brief "The establishment of the actual wage system, however, including the specification of the going wages,

whether or *not* above the basic minimum, was reserved to respondent as among its 'exclusive responsibilities' under the management prerogative clause found in Section 17." (Emphasis supplied) should not be construed as inferring that the Respondent may pay less than the contract minimum. It is true that merit increases above the contract minimum rates are within the exclusive control of management, but the paying of the contract minima is a contractual obligation of the employer. Actually, the provision for contract minima is the conventional clause, common to practically all collective bargaining agreements.

The Court below, considering facts peculiar only to this case, rejected what it felt was a *per se* right to the information enunciated by the Board in its decision. During the cost-of-living reopening, only basic rates were involved and the Union, when asking for the actual rates being paid, inclusive of both the merit increase and the base rate, made no showing as to the relevancy of the requested information at that time. It knew the basic rates and demonstrated no need for the rates over and above them. There was no allegation that Respondent was paying less than the contract rates or that it was discriminating in its application of merit increases.

The Union and Respondent, by a process of collective bargaining, consummated a contract giving Respondent exclusive control over all rates above the contract minimum rates. To adhere to the Board's reasoning that the Union is entitled to the requested information in order to negotiate a cost-of-living increase and intelligently administer the contract, is not only illogical but would actually vary the terms of a contract which was arrived at by the give and take process of collective bargaining. The fact that an agreement on the cost of living increase was reached without such information, is indicative of the fact that the information was not needed for bargaining on the limited reopening.

The Court below, in holding that the Union was not "entitled to information highly personal to employees" in the absence of a showing of "reasonable need of the information to meet a condition," weighed carefully the Union's contention that the data was needed "for intelligent and equitable administration of the contract," and determined that it did not meet the test of reasonable need in this fact situation, since no grievance was alleged and the area was left within the exclusive control of management by the Management Prerogative Clause.

Contrary to the Board's assertion, the decision is not in fact in conflict with the decisions in the aforesaid Circuits. Furthermore, it is in line with the reasoning in the *Truitt* case.

The First Circuit in *Boston Herald-Traveler Corp.* v. *National Labor Relations Board,* 223 F. 2d 58, initially stated that the case could be disposed of solely on the question of relevance and then found that linked wage data, composed of names, job classifications and compensation was relevant to the negotiations in which the parties were engaged. Chief Judge Magruder then suggested in dicta that it would not be unwise to consider the statutory validity of the concept of presumptive relevance of individualized wage data to collective bargaining agreement negotiations. Though the Court indicated in its dicta that it would favor presumptive relevance, neither its decision nor that of the Board was based on such theory, but rather on the actual relevance shown by the record. Furthermore, the Court's dicta discussed only presumptive relevance in relation to information requested during negotiations and not information requested during the life of the contract for administration of the contract. It should be noted that of the Courts of Appeals' decisions alleged to be in conflict with the instant decision, the *Boston Herald* case is the most recent. The decision hinged on relevancy in fact, and not on a *per se* rule.

In *National Labor Relations Board* v. *Yawman & Erbe Manufacturing Co.*, 187 F. 2d 947 (C.A. 2), the Union sought current wage information during contract negotiations and the Board, with the Court's subsequent approval, found the information "clearly relevant" to the 1949 negotiations.

The Fourth Circuit in *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593, was concerned with a request for individual wage data during negotiations for a general wage increase. It was held that the refusal to furnish such information for the Union's use in collective bargaining was a violation of Section 8(a)(5) of the Act and cited numerous cases which upheld a relevancy requirement.* In addition to this, the Court in its dicta leaned toward a *per se* requirement to furnish information. This inclination was in turn based on dicta in the Board's decision, *Whitin Machine Works*, 108 N.L.R.B. 1537.

Finally, the Fifth Circuit ruled on the question in *National Labor Relations Board* v. *The Item Co.*, 220 F. 2d 956. Individual wage data was requested during negotiations and again in contemplation of a broad contract reopening, and the refusal to furnish such was held to be an unfair labor practice. The Court in its decision recognized the relevancy rule expressed in the *Yawman & Erbe* case and then supported its dictum by reference to the "broad rule" contended for in dicta in an opinion of Chairman Guy Farmer concurring in the Board's decision in the *Whitin Machine Works* case, 108 NLRB 1537, 1541.

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* See the following cases for the upholding of the relevancy requirement:
Aluminum Ore Co. v. *National Labor Relations Board*, 131 F. 2d 485 (C.A. 7);
National Labor Relations Board v. *Leland-Gifford*, 200 F. 2d 620 (C.A. 1);
National Labor Relations Board v. *Jacobs Manufacturing Co.*, 196 F. 2d 680 (C.A. 2);
National Labor Relations Board v. *Otis Elevator Co.*, 208 F. 2d 176 (C.A. 2);
National Labor Relations Board v. *New Britain Machine Co.*, 210 F. 2d 61 (C.A. 2), and
International News Service v. *American Newspaper Guild*, 113 N.L.R.B. 1067.

The dicta in *The Item* and the *Whitin* cases, which the Board has interpreted as favoring a *per se* rule appear to be contra to a decision of this Court. This Court rejected a *per se* rule when it came in conflict with a statute requiring a "good faith" standard. *National Labor Relations Board* v. *American Insurance Co.*, 343 U.S. 395. In the instant case, there was also a "good faith" statute involved upon which the charge was based.

The Court below agrees that an employer is under a duty to accommodate a union's request for *relevant* information. The facts peculiar to the instant case did not in the Court's opinion support a finding that the information requested was relevant to any need set forth by the Union. It did not disagree with the findings of other Courts of Appeals that requested information was relevant in the fact situations presented to them.

Thus, factwise, all of the above-mentioned cases, stated by the Board to be in conflict with the decision of the Court below, differ from the instant case. In the *Boston Herald-Traveler* case, the demand is for linked data made during negotiations for a completely new contract and not during a limited reopening for a cost-of-living adjustment or during the term of the contract for the intelligent administration of such contract, as in the instant case. This is also true of the *Yawman* and the *Whitin* cases. In *The Item* case, the demand was made during negotiations and again with respect to a reopening for wage and certain other benefits, but not limited by a standard as in the instant case establishing the cost-of-living as the yardstick for adjustment.

In the instant case, there is a Management Prerogative Clause, giving Respondent exclusive and absolute control over any incentive or bonus pay schedules. Such clause, and particularly the wording thereof, is peculiar to the instant case and in great part is the basis for the decision of the Court below. It considered that the Union's demand for information "for the intelligent and equitable administra-

tion of the agreement" was much too vague. It is to be noted that the Union twice changed the reason for its asserted need for the information, thus indicating that in fact it had no specific need and was merely anxious to obtain the information "to have it around."

It is urged that the uniform requirement in all the cases dealing with the obligation that an Employer furnish to a Union such information, is that the Union must show some need, or relevancy, for the requested information. Each case must therefore be decided on its particular facts.

The Board would have this Court believe that there is an established *per se* requirement to furnish this information. The courts which have suggested a *per se* rule have done so only in dicta after deciding on the record that the information was relevant. The Court below proceeded to render its decision on the facts presented to it. This is a conflict between a decision and dicta and is not the type of confiict upon which certiorari should be granted.

CONCLUSION

The Petition for a Writ of Certiorari should be Denied.

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October, 1956